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No. 80

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE CHOCTAW NATION OF INDIANS, PETITIONER

v.

**THE UNITED STATES AND THE CHICKASAW NATION
OF INDIANS**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS**

MEMORANDUM FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 20-28) is not yet reported.

JURISDICTION

The judgment of the Court of Claims sought to be reviewed was entered on December 1, 1941 (R. 28). A motion for a new trial filed by petitioner on January 19, 1942, was denied February 2, 1942 (R. 28). The petition for a writ of certiorari was filed April 23, 1942. Jurisdiction of this Court is invoked under section 4 of the Act of June 7, 1924,

43 Stat. 537, and section 3 (b) of the Act of February 13, 1925, 43 Stat. 939, as amended by the Act of May 22, 1939, 53 Stat. 752 (U. S. C., title 28, sec. 288 (b)).

QUESTIONS PRESENTED

1. Whether the Chickasaw Nation is entitled to compensation for a one-fourth interest in the common lands of the Choctaws and Chickasaws allotted to Choctaw freedmen, who had been adopted as members of the Choctaw Nation in 1883.

2. Whether, if the Chickasaw Nation is entitled to compensation, payment is to be made by the Choctaw Nation or by the United States.

TREATY AND STATUTES INVOLVED

The relevant provisions of Articles II, III, XI, XV, and XXVI of the Choctaw-Chickasaw Treaty of April 28, 1866, 14 Stat. 769; the relevant paragraph of the Indian Appropriation Act of May 17, 1882, 22 Stat. 68, 72; the relevant portions of sections 11, 21 and 29 of the Curtis Act of June 28, 1898, 30 Stat. 495, incorporating the Atoka Agreement of April 23, 1897; and sections 11, 36, 37, and 40 of the Supplemental Agreement of March 21, 1902, as approved by the Act of July 1, 1902, 32 Stat. 641, are printed in the Appendix, *infra*, pages 10-16. An act of the General Council of the Choctaw Nation approved May 21, 1883, is set out in finding 3 of the Court of Claims (R. 15-16).

STATEMENT

At the time of the Civil War the Choctaw and Chickasaw Nations, each having a substantial negro slave population, owned in common tribal lands in the territory which later became the state of Oklahoma, their respective interests being three-fourths and one-fourth. In the Choctaw-Chickasaw Treaty of April 28, 1866, 14 Stat. 769, it was agreed that the slaves should be freed (Article II) and that the right to select land for allotment in severalty should "extend to all persons who have become citizens by adoption or intermarriage of either of said nations, or who may hereafter become such" (Article XXVI). By a legislative enactment approved May 21, 1883, the Choctaw Nation adopted its former slaves and declared each of them entitled to 40 acres of land, "to be selected and held by them under the same title and upon the same terms as the Choctaws" (R. 15-16).

Accordingly, when it was decided in 1898 that the lands of the Five Civilized Tribes should be allotted in severalty, Congress directed the Dawes Commission to "make a correct roll of all Choctaw freedmen entitled to citizenship under the treaties and laws of the Choctaw Nation, and all their descendants born to them since the date of the [1866] treaty". Act of June 28, 1898, 30 Stat. 495, 502. Each Choctaw freedman so enrolled was to receive 40 acres of land. Act of March 21, 1902, 32 Stat.

641, 642. A similar roll was to be made of Chickasaw freedmen and their descendants, and they too were each to receive 40 acres of land. Act of June 28, 1898, 30 Stat. 495, 502. But the question whether the Chickasaw freedmen had any rights under the 1866 treaty was to be referred to the Court of Claims for adjudication, with the undertaking, should it be decided that the Chickasaw freedmen had no rights, that the United States would compensate the Choctaws and Chickasaws for the lands thus allotted to the Chickasaw freedmen. Act of March 21, 1902, 32 Stat. 641, 649-651. The Court of Claims and this Court subsequently decided that the Chickasaw freedmen, not having been adopted by the Chickasaw Nation, had no rights under the 1866 treaty, and the United States paid compensation in the amount of \$606,936.08 (R. 19). *United States v. Choctaw Nation, et al.*, 38 C. Cls. 558, aff'd, 193 U. S. 115.

Some years later the Chickasaw Nation began urging that it should receive compensation for the lands allotted to Choctaw freedmen. Congress having passed a general jurisdictional statute in 1924 (Act of June 7, 1924, 43 Stat. 537), the Chickasaw Nation brought suit in 1929 to recover from the United States for a one-fourth interest in all lands which had been allotted to the Choctaw freedmen under the Supplemental Agreement of 1902 (R. 1-9). The United States impleaded the Choctaw Nation, contending that if any liability

existed the Choctaw Nation was primarily liable (R. 10-11).

After examining the relevant statutes and other evidentiary material, the Court of Claims held that the Chickasaw Nation had consented to the allotment of land to the Choctaw freedmen, but that the consent was on condition that it was to be at the expense of the Choctaws. It further held "as a conclusion of law that plaintiff is entitled to recover against the defendant, The Choctaw Nation", the exact amount being left for future determination under Rule 39a (R. 28),¹ and that, since the Choctaw Nation was primarily liable "and there being no claim that defendant is unable to satisfy whatever judgment may be rendered, we do not consider nor decide what is the liability, if any, of the defendant, the United States" (R. 27-28).

DISCUSSION

No judgment has as yet been entered against the United States (see R. 28). In fact, the liability of the Government, if any, has not been considered or decided by the Court of Claims (R. 27-28). But in finding that the Chickasaw Nation

¹ Such an interlocutory judgment is reviewable by this Court under section 3 (b) of the Act of February 13, 1925, 43 Stat. 939, as amended by the Act of May 22, 1939, 53 Stat. 752 (U. S. C., title 28, sec. 288 (b)). *United States v. Esnault-Pelterie*, 299 U. S. 201; *Nez Perce Tribe of Indians v. United States*, No. 1096, October Term, 1941, certiorari denied, May 25, 1942.

is entitled to compensation for lands allotted to the Choctaw freedmen the court below rejected a defense which both the Government and the Choctaw Nation had interposed, thus settling as "the law of the case" in the Court of Claims this issue, should it later become necessary, because of the size of the judgment, to examine into the Government's liability. For that reason we deem it appropriate to state the position of the United States respecting the judgment in question.

1. The Government agrees with the decision below that if the Chickasaw Nation is entitled to compensation for lands allotted to Choctaw freedmen the Choctaw Nation is primarily liable: In adopting its former slaves in 1883, the Choctaw Nation expressly declared that these persons should "be entitled to forty acres each * * * to be selected and held by them under the same title and upon the same terms as the Choctaws" (R. 16). And in the Supplemental Agreement of 1902 the Choctaws again agreed that their freedmen should receive 40-acre allotments. Act of July 1, 1902, 32 Stat. 641. Since these tribes already held their lands in fee, the patents subsequently issued to the Choctaw freedmen were executed by the principal chiefs of the Choctaw and Chickasaw Nations and not by the President of the United States. Hence, if any lands were allotted without the unconditional consent of the Chickasaw Nation, giving rise to a right in that Na-

tion to be compensated, it seems clear that the Choctaw Nation has the primary duty to pay compensation. Cf. *United States v. Algoma Lumber Co.*, 305 U. S. 415, 420-422; *Lowden v. United States*, 93 C. Cls. 584, certiorari denied, 314 U. S. 651 (see Brief for the United States in Opposition, pp. 7-8).

2. But the Government is of the view that the court below erred in holding that the Chickasaw Nation is entitled to compensation for the lands allotted to Choctaw freedmen. In Article XXVI of the Treaty of April 28, 1866, 14 Stat. 769, the Chickasaws expressly agreed that the right to select land in severalty should extend to "all persons" who were, or might thereafter become, "by adoption or intermarriage", citizens of either Nation. Upon their adoption *en masse* in 1883 (R. 15-16), the Choctaw freedmen thus became citizens of the Choctaw Nation and as such entitled to participate in any subsequent allotment of land in severalty to citizens of that tribe. The Choctaw freedmen were accordingly placed on the tribal rolls prepared by the Dawes Commission. Act of June 28, 1898, 30 Stat. 495, 502. And by paragraph 11 of the Supplemental Agreement of March 21, 1902, 32 Stat. 641, it was mutually agreed that the Choctaw freedmen should receive "land equal in value to forty acres of the average allotable land of the Choctaw and Chickasaw freedmen."

This provision, unlike that regarding allotments to the Chickasaw freedmen, was unconditional. Thus it seems to have been the clear understanding of Congress and of both tribes that the Choctaw freedmen, by virtue of Article XXVI of the 1866 Treaty and the adoption Act of May 21, 1883, were entitled to participate in the distribution of tribal lands.

That such was the understanding with respect to the rights and status of the Choctaw freedmen is accentuated by the contemporaneous controversy over the rights of the Chickasaw freedmen. They too were to be enrolled and to receive 40-acre allotments, but since they had never been adopted by the Chickasaws there were grave doubts whether they had any legal rights whatever in the communal property of these two tribes. The question of their rights, but not those of the Choctaw freedmen, was therefore to be submitted to the Court of Claims, and if it was determined that they had no rights, then the United States was to reimburse the two tribes for lands thus ordered allotted to the Chickasaw freedmen (see Statement, page 4, *supra*).

This marked contrast between the provisions with respect to the Choctaw freedmen on the one hand and the Chickasaw freedmen on the other emphasizes the difference in their legal status. Both tribes had agreed in 1866 that each should be able to confer citizenship and property

rights on its adoptees. In 1883 the Choctaws adopted their emancipated slaves; the Chickasaws did not adopt theirs. Hence, the former were entitled to allotments as a matter of law, the latter only as a matter of grace and upon proper reimbursement of the tribes by the United States. Since the Chickasaws agreed to allow the Choctaws to adopt new members, the Chickasaws cannot complain of the Choctaw adoption act of 1883 and the subsequent allotment of land to the adopted citizens of the Choctaw Nation.

CONCLUSION

It is the view of the Government that the judgment below is erroneous. Since that judgment might subsequently result in liability of the United States to the Chickasaw Nation, the Government does not oppose the granting of the petition of the Choctaw Nation for certiorari.

Respectfully submitted,

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JULY 1942.

APPENDIX

The relevant provisions of the Choctaw-Chickasaw Treaty of April 28, 1866, 14 Stat. 769, are as follows:

ARTICLE II. The Choctaws and Chickasaws hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in punishment of crime whereof the parties shall have been duly convicted, in accordance with laws applicable to all members of the particular nation, shall ever exist in said nations.

ARTICLE III. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, and provided that the said sum shall be invested and held by the United States, at an interest not less than five percent, in trust for the said nations, until the legislatures of the Choctaw and Chickasaw nations respectively shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to

be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three fourths to the former and one fourth to the latter, less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules, and regulations shall elect to remove and actually remove from the said nations respectively. And should the said laws, rules, and regulations not be made by the legislatures of the said nations respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper,—the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations.

ARTICLE XI. Whereas the land occupied by the Choctaw and Chickasaw nations, and

described in the treaty between the United States and said nations, of June twenty-second, eighteen hundred and fifty-five, is now held by the members of said nations in common, under the provisions of the said treaty; and whereas it is believed that the holding of said land in severalty will promote the general civilization of said nations, and tend to advance their permanent welfare and the best interests of their individual members, it is hereby agreed that, should the Choctaw and Chickasaw people, through their respective legislative councils, agree to the survey and dividing their land on the system of the United States, the land aforesaid east of the ninety-eighth degree of west longitude shall be, in view of the arrangements hereinafter mentioned, surveyed and laid off in ranges, townships, sections, and parts of sections; * * *

ARTICLE XV. At the expiration of the ninety days' notice aforesaid, the selection which is to change the tenure of the land in the Choctaw and Chickasaw nations from a holding in common to a holding in severalty shall take place, when every Choctaw and Chickasaw shall have the right to one quarter-section of land, whether male or female, adult or minor, * * *

ARTICLE XXVI. The right here given to Choctaws and Chickasaws, respectively, shall extend to all persons who have become citizens by adoption or intermarriage of either of said nations, or who may hereafter become such.

The relevant paragraph of the Indian Appropriation Act of May 17, 1882, 22 Stat. 68, 72, is as follows:

That the sum of ten thousand dollars is hereby appropriated, out of the three hundred thousand dollars reserved by the third article of the treaty with the Choctaws and Chickasaws concluded April eighth, eighteen hundred and sixty-six, for the purpose of educating freedmen in said tribes, to be expended under the direction of the Secretary of the Interior, three-fourths thereof for the freedmen among the Choctaws, and one-fourth for the freedmen among the Chickasaws: *Provided*, That said sum of ten thousand dollars shall be deducted in like proportion from any moneys in this act appropriated to be paid said Choctaws and Chickasaws: *and provided further*, That either of said tribes may, before such expenditure, adopt and provide for the freedmen in said tribe in accordance with said third article, and in such case the money herein provided for such education in said tribe shall be paid over to said tribe, to be taken from the unpaid balance of the three hundred thousand dollars due said tribe.

The relevant portions of the Curtis Act of June 28, 1898, 30 Stat. 495, are as follows:

SEC. 11. That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the commission heretofore appointed under Acts of Congress, and known as the "Dawes Commission," shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as pos-

sible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same; * * *

SEC. 21. * * *

It shall make a correct roll of all Choctaw freedmen entitled to citizenship under the treaties and laws of the Choctaw Nation, and all their descendants born to them since the date of the treaty.

It shall make a correct roll of Chickasaw freedmen entitled to any rights or benefits under the treaty made in eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw tribes and their descendants born to them since the date of said treaty and forty acres of land, including their present residences and improvements, shall be allotted to each, to be selected, held, and used by them until their rights under said treaty shall be determined in such manner as shall be hereafter provided by Congress.

SEC. 29. * * *

That the lands allotted to the Choctaw and Chickasaw freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw tribe so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same.

That the said Choctaw and Chickasaw Freedmen who may be entitled to allotments of forty acres each shall be entitled each to land equal in value to forty acres of the average land of the two nations.

The relevant sections of the Supplemental Agreement of March 21, 1902, as approved by the Act of July 1, 1902, 32 Stat. 641, are as follows:

11. There shall be allotted to each member of the Choctaw and Chickasaw tribes,

as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw nations; to conform, as nearly as may be, to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements. * * *

CHICKASAW FREEDMEN

36. Authority is hereby conferred upon the Court of Claims to determine the existing controversy respecting the relations of the Chickasaw freedmen to the Chickasaw Nation and the rights of such freedmen in the lands of the Choctaw and Chickasaw nations under the third article of the treaty of eighteen hundred and sixty-six, between the United States and the Choctaw and Chickasaw nations, and under any and all laws subsequently enacted by the Chickasaw legislature or by Congress.

37. To that end the Attorney-General of the United States is hereby directed, on behalf of the United States, to file in said Court of Claims, within sixty days after this agreement becomes effective, a bill of interpleader against the Choctaw and Chickasaw nations and the Chickasaw freedmen, setting forth the existing controversy between the Chickasaw Nation and the Chickasaw freedmen and praying

that the defendants thereto be required to interplead and settle their respective rights in such suit.

40. In the meantime the Commission to the Five Civilized Tribes shall make a roll of the Chickasaw freedmen and their descendants, as provided in the Atoka agreement, and shall make allotments to them as provided in this agreement, which said allotments shall be held by the said Chickasaw freedmen, not as temporary allotments, but as final allotments, and in the event that it shall be finally determined in said suit that the Chickasaw freedmen are not, independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw nations according to their respective interests, and against the United States, for the value of the lands so allotted to the Chickasaw freedmen as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment, which decree shall take the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw nations against the United States or the said freedmen on account of the taking of the said lands for allotment to said freedmen: *Provided*, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid.

